

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

LINWOOD SUTTON, } Case No. 14-CV-2008-BAS (JMA)  
Plaintiff, }  
v. } **REPORT AND  
RECOMMENDATION OF UNITED  
STATES MAGISTRATE JUDGE  
RE PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT [ECF  
NO. 16] AND DEFENDANT'S  
CROSS-MOTION FOR  
SUMMARY JUDGMENT  
[ECF NO. 17]**  
CAROLYN W. COLVIN, Acting  
Commissioner of Social Security, }  
Defendant. }

Plaintiff Linwood Sutton ("Plaintiff") seeks judicial review of Defendant Acting Social Security Commissioner Carolyn W. Colvin's ("Defendant") determination that he is not entitled to disability insurance benefits ("DIB") and supplemental security income ("SSI"). The parties have filed cross-motions for summary judgment. For the reasons set forth below, the Court recommends Plaintiff's motion for summary judgment be **DENIED** and Defendant's cross-motion for summary judgment be **GRANTED**.

**I. BACKGROUND**

Plaintiff, a resident of Vista, California, was born on January 7, 1951. (Admin. R. at 47.) He graduated from high school and served eight years

1 in the Marine Corps. (Id. at 28-29, 36.) He has worked in the past for  
2 moving companies, in a plastic sheeting factory, as a general laborer, and  
3 as a janitor at Sea World. (Id. at 30-36, 228.) He last worked as a bell  
4 ringer for the Salvation Army in 2011, but that was seasonal work only and  
5 he otherwise had not worked since 2005. (Id. at 29-30, 187-89.) In  
6 applications for DIB and SSI filed on August 4, 2011, Plaintiff alleged a  
7 disability onset date of December 26, 2003 due to knee issues. (Id. at 160-  
8 77, 206-09.) Plaintiff's applications were denied initially on November 7,  
9 2011 and upon reconsideration on March 29, 2012. (Id. at 85-90, 96-100.)  
10 On April 9, 2012, Plaintiff requested an administrative hearing. (Id. at 102-  
11 03.) A video hearing was conducted on March 22, 2013 by Administrative  
12 Law Judge ("ALJ") John D. Moreen, who determined on May 20, 2013 that  
13 Plaintiff was not disabled. (Id. at 6-16.) Plaintiff requested a review of the  
14 ALJ's decision; the Appeals Council for the Social Security Administration  
15 ("SSA") denied Plaintiff's request for review on June 26, 2014. (Id. at 1-3.)  
16 Plaintiff then commenced this action pursuant to 42 U.S.C. § 405(g).

17

18 **II. MEDICAL EVIDENCE**

19 **A. Vista Community Clinic (Treating Provider)**

20 On June 7, 2011, Plaintiff presented to Donald Ong, M.D. of the Vista  
21 Community Clinic with a complaint of left knee pain. (Id. at 296-98.)  
22 Plaintiff reported he had been hurt at work in 2000, had arthroscopic  
23 surgery in 2004 which showed ligament injury, and had not had any follow-  
24 up, even though he experienced on and off pain since then. (Id. at 296.)  
25 Dr. Ong diagnosed a sprain of the medial collateral ligament, prescribed  
26 ibuprofen, and advised Plaintiff to obtain insurance so he could request an  
27 MRI. (Id. at 297.)

28 On July 2, 2011, Plaintiff returned to the Vista Community Clinic for

1 an office visit with Nurse Practitioner Charles Gentzsch. (Id. at 293-95.)  
2 Plaintiff described his left knee pain as sharp and stated the pain was  
3 aggravated by bending. (Id. at 293.) Nurse Gentzsch observed swelling,  
4 mild pain with motion, and post-surgical scars on Plaintiff's left knee, and  
5 provided Plaintiff with a note indicating he would be restricted to light or  
6 limited work for two weeks. (Id. at 292, 294.)

7 **B. Phong T. Dao, D.O. (Examining Physician)**

8 Dr. Phong T. Dao conducted an internal medicine evaluation of  
9 Plaintiff on October 17, 2011 at the request of the state Department of  
10 Social Services. (Id. at 282-87.) Plaintiff advised Dr. Dao he had  
11 experienced left knee pain since 2002 when he fell and injured his knee.  
12 (Id. at 282.) He had surgery about eight months after the incident, which  
13 had improved the knee pain until recently, when he noted increasing left  
14 knee pain and occasional swelling of the knee with prolonged standing and  
15 walking in June 2011. (Id.) At the time of the examination, the pain was an  
16 "aching, throbbing, sharp" pain that occurred intermittently. (Id. at 282-83.)

17 On examination, Dr. Dao noted tenderness to palpation of the medial  
18 aspect of the left knee. (Id. at 285.) An x-ray of the left knee showed early  
19 osteoarthritis. (Id. at 286, 288.) Dr. Dao further noted Plaintiff ambulated  
20 with a slight limp putting almost all of his weight on the right knee. (Id. at  
21 286.) Dr. Dao diagnosed degenerative joint disease of the left knee. (Id.)  
22 He opined Plaintiff could lift, carry, push, or pull 50 pounds occasionally  
23 and 25 pounds frequently, could stand or walk for 6 hours in an 8 hour  
24 workday, could sit with no limitation, and could frequently climb, stoop,  
25 kneel, and crouch. (Id. at 286-87.)

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### 1           **III. THE ADMINISTRATIVE HEARING**

#### 2           **A. Plaintiff's Testimony**

3           The ALJ conducted an administrative hearing on March 22, 2013.

4           (Id. at 25.) Plaintiff testified much of his past work has been seasonal and  
5 he has not applied for full-time work since 1986 or 1987 because he has a  
6 felony on his record from over thirty years ago. (Id. at 36-37.) He has  
7 found people continue to think of him as a felon. (Id. at 36.) He testified he  
8 is unable to work because of left knee problems. (Id. at 37.) He spends  
9 his time babysitting his granddaughter, and performs housework including  
10 vacuuming and washing dishes. (Id. at 38.) He does not have a driver's  
11 license and takes the bus to get around town. (Id. at 39.)

12           Plaintiff testified he is able to stand for four hours, after which he  
13 experiences a tingling sensation in his knee and has to get off his feet for at  
14 least an hour and a half. (Id. at 39-40.) He does not have any problems  
15 with sitting. (Id. at 40.) He grew tearful during his testimony and explained  
16 that talking about his background and being unable to be hired for jobs as a  
17 result of it is emotional for him. (Id. at 40.) He does not have friends he  
18 sees socially, because the friends he used to see have felony records. (Id.  
19 at 41.) He believes he could lift 20-30 pounds at a job because that would  
20 not cause his knee to bend very much, but would have problems squatting  
21 down. (Id.)

#### 22           **B. Vocational Expert's Testimony**

23           The vocational expert ("VE"), Jane Haile, identified Plaintiff's past  
24 relevant work as contribution solicitor (light, unskilled work), material  
25 handler (heavy, semi-skilled work), and winder operator (heavy, unskilled  
26 work). (Id. at 42.) In response to a hypothetical posed by the ALJ, the VE  
27 testified a person of Plaintiff's age, education, and background, who could  
28 occasionally lift 50 pounds and frequently lift 25 pounds, stand for 6 hours

1 in an 8 hour day, and sit for 6 hours in an 8 hour day, could perform the  
2 work of a contribution solicitor, but not the other two jobs. (Id. at 42-43.)  
3 There are no full-time contribution solicitor jobs that exist, as they are  
4 temporary, seasonal jobs. (Id. at 43.) The VE testified there are medium  
5 unskilled jobs in the local or national economy an individual such as  
6 Plaintiff could perform, including a hospital cleaner, store laborer, and hand  
7 packager. (Id. at 43-44.) The VE further testified a person who could  
8 stand for only 4 hours at a time and then needed to sit for 2 hours, and who  
9 could lift 20-30 pounds, could not perform medium work and would be  
10 limited to light level work. (Id. at 44.)

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#### 12 **IV. THE ALJ DECISION**

13 After considering the record, ALJ Moreen made the following  
14 findings:

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16 . . .

17 2. The claimant has not engaged in substantial gainful activity  
18 since December 26, 2003, the alleged onset date [citations  
19 omitted].

20 . . .

21 3. The claimant has the following severe impairment[]: early  
22 osteoarthritis of the left knee [citations omitted].

23 . . .

24 4. The claimant does not have an impairment or  
25 combination thereof that meets or medically equals the  
26 severity of one of the listed impairments in [the Social  
27 Security regulations].

28 . . .

5. After careful consideration of the entire record, I find that the

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<sup>1</sup>In making this finding, the ALJ found Plaintiff's earnings of \$7,801.50 in 2003, \$102.50 in 2004, and \$6,171.72 in 2005 did not meet substantial gainful activity level for the years in which they were earned. (Admin. R. at 11.)

1 claimant has the residual functional capacity to perform medium  
2 work as defined in 20 C.F.R 404.1567(c) and 416.967(c), he  
3 can lift 50 pounds occasionally, 25 pounds frequently; can  
4 stand/walk for six hours out of an eight hour day; can sit for six  
5 hours out of an eight hour day; and can frequently balance,  
6 crouch, crawl, kneel, stoop or climb.  
7 . . .  
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9 6. The claimant is unable to perform any past relevant work  
10 [citations omitted].  
11 . . .  
12 10. Considering the claimant's age, education, work experience,  
13 and residual functional capacity, there are jobs that exist in  
14 significant numbers in the national economy that the claimant  
15 can perform [citations omitted].  
16 . . .  
17 11. The claimant has not been under a disability, as defined in the  
18 Social Security Act, from December 26, 2003, through the date  
19 of this decision [citations omitted].

20 (Id. at 11-16.)

## 21 **V. STANDARD OF REVIEW**

22 To qualify for disability benefits under the Social Security Act, an  
23 applicant must show: (1) He or she suffers from a medically determinable  
24 impairment that can be expected to result in death or that has lasted or can  
25 be expected to last for a continuous period of twelve months or more, and  
26 (2) the impairment renders the applicant incapable of performing the work  
27 that he or she previously performed or any other substantially gainful  
28 employment that exists in the national economy. See 42 U.S.C. § 423(d)(1)(A), (2)(A). An applicant must meet both requirements to be  
“disabled.” Id. Further, the applicant bears the burden of proving he or she  
was either permanently disabled or subject to a condition which became so  
severe as to disable the applicant prior to the date upon which his or her  
disability insured status expired. Johnson v. Shalala, 60 F.3d 1428, 1432

1 (9th Cir. 1995).

2 **A. Sequential Evaluation of Impairments**

3 The Social Security Regulations outline a five-step process to  
 4 determine whether an applicant is "disabled." The five steps are as  
 5 follows: (1) Whether the claimant is presently working in any substantial  
 6 gainful activity. If so, the claimant is not disabled. If not, the evaluation  
 7 proceeds to step two. (2) Whether the claimant's impairment is severe. If  
 8 not, the claimant is not disabled. If so, the evaluation proceeds to step  
 9 three. (3) Whether the impairment meets or equals a specific impairment  
 10 listed in the Listing of Impairments. If so, the claimant is disabled. If not,  
 11 the evaluation proceeds to step four. (4) Whether the claimant is able to do  
 12 any work he has done in the past. If so, the claimant is not disabled. If not,  
 13 the evaluation continues to step five. (5) Whether the claimant is able to do  
 14 any other work. If not, the claimant is disabled. Conversely, if the  
 15 Commissioner can establish there are a significant number of jobs in the  
 16 national economy the claimant can do, the claimant is not disabled. 20  
 17 C.F.R. § 404.1520; see also Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th  
 18 Cir. 1999).

19 **B. Judicial Review**

20 Sections 205(g) and 1631(c)(3) of the Social Security Act allow  
 21 unsuccessful applicants to seek judicial review of the Commissioner's final  
 22 agency decision. 42 U.S.C.A. §§ 405(g), 1383(c)(3). The scope of judicial  
 23 review is limited. The Commissioner's final decision should not be  
 24 disturbed unless: (1) The ALJ's findings are based on legal error or (2) are  
 25 not supported by substantial evidence in the record as a whole. Schneider  
 26 v. Comm'r Soc. Sec. Admin., 223 F.3d 968, 973 (9th Cir. 2000); Garrison v.  
 27 Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). Substantial evidence means  
 28 "more than a mere scintilla but less than a preponderance; it is such

1 relevant evidence as a reasonable mind might accept as adequate to  
 2 support a conclusion." Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir.  
 3 1995). The Court must consider the record as a whole, weighing both the  
 4 evidence that supports and detracts from the Commissioner's conclusion.  
 5 See Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001); Desrosiers v.  
 6 Sec'y of Health & Human Servs., 846 F.2d 573, 576 (9th Cir. 1988). "The  
 7 ALJ is responsible for determining credibility, resolving conflicts in medical  
 8 testimony, and for resolving ambiguities." Vasquez v. Astrue, 572 F.3d  
 9 586, 591 (9th Cir. 2009) (citing Andrews, 53 F.3d at 1039). Where the  
 10 evidence is susceptible to more than one rational interpretation, the ALJ's  
 11 decision must be affirmed. Id. at 591 (citation and quotations omitted).

12 Section 405(g) permits this Court to enter a judgment affirming,  
 13 modifying, or reversing the Commissioner's decision. 42 U.S.C.A. §  
 14 405(g). The matter may also be remanded to the SSA for further  
 15 proceedings. Id.

## 16 VI. DISCUSSION

17 Plaintiff contends the ALJ committed error by failing to articulate  
 18 sufficient reasons for discrediting his symptom testimony and finding him  
 19 not credible. (Pl.'s Mem. at 3-12.)

20 In determining a claimant's residual functional capacity<sup>2</sup> at steps four  
 21 and five of the sequential evaluation process, the ALJ must consider all  
 22 relevant evidence in the record, including medical records, lay evidence,  
 23 and "the effects of symptoms, including pain, that are reasonably attributed

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 25 <sup>2</sup>Residual functional capacity ("RFC") is defined as "the most you can still  
 26 do despite your limitations." See 20 C.F.R. § 404.1545(a)(1); 20 C.F.R. §  
 27 416.945(a)(1). "Ordinarily, RFC is the individual's maximum remaining ability to  
 28 do sustained work activities in an ordinary work setting on a regular and  
 continuing basis, ... mean[ing] 8 hours per day, for 5 days a week, or an  
 equivalent work schedule." SSR 96-8p, 1996 WL 374184, at \*2 (emphases  
 omitted).

1 to a medically determinable impairment.” See Robbins v. Soc. Sec.  
2 Admin., 466 F.3d 880, 883 (9th Cir. 2006) (citing SSR 96-8p, 1996 WL  
3 374184, at \*5). “Careful consideration must be given to any available  
4 information about symptoms because subjective descriptions may indicate  
5 more severe limitations or restrictions than can be shown by objective  
6 medical evidence alone.” SSR 96-8p, 1996 WL 374184, at \*5; see also 20  
7 C.F.R. § 404.1529(c)(3). When considering a claimant’s subjective  
8 symptom testimony, “if the record establishes the existence of a medically  
9 determinable impairment that could reasonably give rise to the reported  
10 symptoms, an ALJ must make a finding as to the credibility of the  
11 claimant’s statements about the symptoms and their functional effect.”  
12 Robbins, 466 F.3d at 883 (9th Cir. 2006) (citing SSR 96-7p, 1996 WL  
13 374186, at \*1). “While an ALJ may find testimony not credible in part or in  
14 whole, he or she may not disregard it solely because it is not substantiated  
15 affirmatively by objective evidence.” Id. Rather, an ALJ may only find a  
16 claimant not credible by making specific findings as to credibility and  
17 stating clear and convincing reasons to discount the claimant’s subjective  
18 symptom testimony. Id.; see also Lingenfelter v. Astrue, 504 F.3d 1028,  
19 1036 (9th Cir. 2007); Garrison, 759 F.3d at 1014-15.

20 The ALJ found Plaintiff’s statements concerning the intensity,  
21 persistence, and limiting effects of his symptoms not entirely credible for  
22 the following reasons: (1) Plaintiff’s daily activities are not limited to the  
23 extent one would expect given his complaints of disabling symptoms and  
24 limitations; (2) Plaintiff has not received the type of medical treatment one  
25 would expect for an individual claiming restrictive work limitations; (3)  
26 There was a lack of objective medical evidence in the record to support  
27 Plaintiff’s allegations of severe limitations; (4) Plaintiff provided  
28 contradictory information about whether he had worked since his alleged

1 onset date; and (5) Plaintiff's work history raises a question whether his  
2 continuing unemployment is actually due to medical impairments. (Admin.  
3 R. at 13-14.)

4 It is proper for an ALJ to consider the claimant's daily activities in  
5 making his credibility determination. See, e.g., Thomas v. Barnhart, 278  
6 F.3d 947, 958-59 (9th Cir. 2002); see also 20 C.F.R. §§ 404.1529(c)(3)(i),  
7 416.929(c)(3)(i) (claimant's daily activities relevant to evaluating  
8 symptoms). "One does not need to be 'utterly incapacitated' in order to be  
9 disabled." Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001) (citing  
10 Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). "[M]any home activities  
11 are not easily transferable to what may be the more grueling environment  
12 of the workplace, where it might be impossible to periodically rest or take  
13 medication." Fair, 885 F.2d at 603. Only if a claimant's level of activities is  
14 inconsistent with his claimed limitations would activities of daily living have  
15 any bearing on the claimant's credibility. Reddick v. Chater, 157 F.3d 715,  
16 722 (9th Cir. 1998). Here, Plaintiff's daily activities, namely, babysitting his  
17 granddaughter and performing housework, including dishes and  
18 vacuuming, were not inconsistent with his testimony that he is able to stand  
19 for 4 hours, sit without limitation, and lift 20-30 pounds. Therefore,  
20 Plaintiff's daily activities do not provide a basis for the ALJ to find Plaintiff  
21 not credible. Nonetheless, Plaintiff's testimony about his daily activities  
22 does not necessarily help him establish disability, either, as it is not  
23 inconsistent with an ability to function in a workplace environment.  
24 Therefore, this factor weighs neither for nor against the ALJ's evaluation of  
25 Plaintiff's pain testimony.

26 The Court finds the ALJ's second reason for discounting Plaintiff's  
27 credibility, that Plaintiff has not received the type of medical treatment one  
28 would expect for an individual claiming restrictive work limitations, to be

1 clear and convincing. Plaintiff had arthroscopic surgery on his left knee  
2 around 2002 or 2004 which apparently improved his symptoms, and  
3 though he claims “on and off” pain since then, the record shows he did not  
4 seek any evaluation or treatment until 2011, just prior to filing his  
5 applications for DIB and SSI. An “unexplained, or inadequately explained,  
6 failure to seek treatment” is a relevant factor in assessing credibility of pain  
7 testimony. Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991). The ALJ  
8 additionally noted Plaintiff only uses ibuprofen and Tylenol for pain relief,  
9 and the little treatment he received was essentially routine and  
10 conservative in nature. (See Admin. R. at 13.) Receiving only “minimal”  
11 and “conservative” treatment is a valid reason to discredit a claimant’s  
12 symptom testimony. Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999).

13 As for the ALJ’s third stated reason for discounting Plaintiff’s pain  
14 testimony, although an ALJ may not disregard a claimant’s testimony  
15 “solely because it is not substantiated affirmatively by objective medical  
16 evidence” (see Robbins, 466 F.3d at 883 [emphasis added]), the ALJ may  
17 consider whether the alleged symptoms are consistent with the medical  
18 evidence as one factor in his evaluation. See Lingenfelter, 504 F.3d at  
19 1040; see also Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005)  
20 (“Although lack of medical evidence cannot form the sole basis for  
21 discounting pain testimony, it is a factor that the ALJ can consider in his  
22 credibility analysis.”) Given the minimal medical evidence in the record, as  
23 summarized above, the ALJ’s determination that the record does not  
24 support Plaintiff’s allegations of disability is clear and convincing.

25 The ALJ’s fourth proffered reason for discounting Plaintiff’s symptom  
26 testimony is two-fold: that Plaintiff provided inconsistent testimony  
27 regarding his past work, and that Plaintiff’s impairment did not previously  
28 prevent him from working strongly suggests it would not currently prevent

1 him from working. (Admin. R. at 13-14.) In his applications for DIB and  
 2 SSI, Plaintiff stated he had been unable to work since December 26, 2003.  
 3 (Id. at 160.) He told the consultative examiner, Dr. Dao, that he had last  
 4 worked as a mover helper in 2004. (Id. at 283.) At the administrative  
 5 hearing, Plaintiff testified he had last worked in 2006 or 2007 as a seasonal  
 6 worker for moving companies, but then provided testimony he had worked  
 7 in 2011 as a bell ringer for the Salvation Army. (Id. at 29-31.) Plaintiff's  
 8 earning records reflected he worked in 2005, when he earned \$6,171.72,  
 9 and then not again until 2011, when he earned \$1,293.00 working for the  
 10 Salvation Army. (Id. at 188.)<sup>3</sup>

11       Inconsistent statements and testimony can bear upon a claimant's  
 12 credibility. See, e.g., Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir.  
 13 1999). The record is not clear whether the contradiction between Plaintiff's  
 14 onset date and when he last performed work was the result of Plaintiff not  
 15 being completely truthful or a failure to remember dates. However, the  
 16 ALJ's observation that Plaintiff was not previously prevented from working  
 17 despite the presence of his alleged impairment at approximately the same  
 18 level of severity is a clear and convincing reason to discredit Plaintiff's pain  
 19 testimony.

20       The fifth reason proffered by the ALJ for discounting Plaintiff's  
 21 credibility relates to the issue of whether his continuing unemployment is  
 22 actually due to medical impairments. As the ALJ stated:

23       A review of the claimant's work history shows that the claimant  
 24 worked only sporadically prior to the alleged disability onset  
 25 date, which raises a question as to whether the claimant's  
 26 continuing unemployment is actually due to his medical  
 27 impairments. The claimant testified that he seldom held a full  
 28 time job because he has a felony record which makes it difficult

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27       <sup>3</sup>At the conclusion of the administrative hearing, Plaintiff's attorney  
 28 attempted to amend the alleged onset date to January 7, 2006. (Admin. R. at  
 44.) Although the ALJ accepted the amendment (see id.), his written decision  
 still reflects a disability onset date of December 26, 2003 (id. at 9).

1 to be hired full time. He was convicted of armed robbery more  
 2 than 30 years ago. The claimant stated that he has not applied  
 3 for a full time job since 1986 or 1987.

4 (Admin. R. at 14.) An ALJ may properly consider a claimant's work record  
 5 when weighing a claimant's credibility. Light v. Soc. Sec. Admin., 119 F.3d  
 6 789, 792 (9th Cir. 1997). Here, the ALJ could properly find Plaintiff's  
 7 testimony regarding the reasons he had not sought work and had been  
 8 unemployed for so long undermined his credibility and his claim that his  
 knee impairment prevented him from working.

9 An ALJ's assessment of pain severity and claimant credibility is  
 10 entitled to "great weight." Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir.  
 11 1989). The Court concludes the ALJ articulated sufficient clear and  
 12 convincing reasons supported by substantial evidence to discount Plaintiff's  
 13 subjective pain testimony.

## 14 15 **VII. CONCLUSION**

16 For the reasons set forth above, the Court recommends Plaintiff's  
 17 motion for summary judgment be **DENIED** and Defendant's motion for  
 18 summary judgment be **GRANTED**.

19 This report and recommendation will be submitted to the Honorable  
 20 Cynthia A. Bashant, United States District Judge assigned to this case,  
 21 pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file  
 22 written objections with the Court and serve a copy on all parties on or  
 23 before **September 23, 2015**. The document should be captioned  
 24 "Objections to Report and Recommendation." Any reply to the Objections  
 25 shall be served and filed on or before **October 5, 2015**. The parties are  
 26 advised that failure to file objections within the specified time may waive  
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 28 //

1 the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153  
2 (9th Cir. 1991).

3 DATED: September 8, 2015

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5 Jan M. Adler  
U.S. Magistrate Judge

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